



Waters of the US Update

May 28, 2014, Urbandale, IA - The US EPA and the Army Corps of Engineers have published their Clean Water Act (CWA) “waters of the United States” (WOTUS) proposed rulemaking in the Federal Register. This new rule would define the following waters and water features as WOTUS: all major bodies of water, all major rivers that flow to the major bodies of water, all impoundments of rivers and their tributaries, all waters (including wetlands) that are adjacent to all of the above waters, all former streams (even if they only flow when it rains) that have been improved for drainage purposes, all ditches that drain a WOTUS, all permanently flowing ditches even if excavated wholly in upland areas, and on a case-by-case basis, isolated waters or wetlands that alone or in combination with other similarly situated waters in the area have a significant nexus to any of the waters identified above.

Most producers are probably aware that the permanent flowing waters, like rivers and major streams, in their area are WOTUS. In the case of these other, more ephemeral and much smaller streams, and the water features or wet areas in floodplains of rivers and tributaries, US EPA contends that these are already covered under the CWA. (The new rulemaking is then, for US EPA, simply a clarification of this existing authority). But that contention is questioned by many. Furthermore, it is clear to farm observers that it will be a major and unpleasant surprise to most farmers that these drainage features, wet areas and isolated waters on or next to their farms could very well be “jurisdictional” waters. Adding to this surprise and anxiety is the great uncertainty that comes from not being able to know, without a site-specific, field determination by EPA or Corps of Engineers staff, whether or not a drainage feature or occasionally wet areas on their farm is jurisdictional. These will be judgment calls made by the agency staff in the field, and the outcomes of these determinations can't be predicted.

Under the existing rule, the agencies have very rarely interpreted the definition of tributary in practice to include ephemeral drainage features. Under the proposed rule, an ephemeral drainage feature is a tributary (stream) if it has a discernible bed, bank and ordinary high water mark, even if it only has water in it immediately after a rain event. This means there are hundreds of thousands of miles of drainage segments out there, if not more, that would be considered ephemeral tributaries and therefore WOTUS. Most any place in the country

will be in direct contact or very close proximity to a WOTUS and the jurisdictional reach of the CWA under this proposal as a result.

This new proposed rule also creates definitions for adjacency, neighboring, floodplain and riparian areas. These new definitions have cast a very broad net that encompasses much of the United States landscape that was not already covered by ephemeral tributaries.

The federal agencies point out that the Clean Water Act exemptions for farming activities are not amended by this proposed rule and are still available to farmers. While true, in practice this will often prove of little help. In the case of the Section 404 permitting program, for many farming activities not covered in the Interpretive Rule discussed below, farmers will need to go to the Corps and EPA and ask if the exemption applies, and experience shows that the agencies interpret exemptions narrowly. We also know that in the Corn Belt today that the Army Corps of Engineers is aggressively asserting that farmers carrying out upland practices that **might** be affecting a water of the US must get a permit for several standard land management practices. There are also numerous other legal risks to farmers if they have drainage features on their property that are WOTUS and may be applying fertilizer or pesticides through nozzles in their proximity; some federal courts have already called such activities a point source discharge needing a CWA NPDES permit.

Alongside this new rule, the US EPA and Corps issued a Section 404 final “Interpretive Rule.” That rule identifies 56 conservation practices that the agencies, working with USDA-NRCS, have determined are “normal farming practices” exempt from Section 404 of the CWA, the dredge and fill permitting requirements. The practices are exempt if they are carried out in accordance with the applicable USDA-NRCS conservation practice standard. The problem with this “Interpretive Rule” is that many farmers already considered many of these 56 practices to be “normal farming” activities, which meant they were already exempt. Under the Interpretive Rule, farmers will now wonder if they are going to be challenged if they conduct these practices on their farm without formal and meticulous adherence to the written NRCS practice standards. Will failure to follow every aspect of that standard, or failure to document that adherence, or failure to get NRCS approval of the use of the practice in adherence to the standard increase the risk that the farmer could be found in violation of the CWA?

The bottom line is that the rule will allow the federal government to greatly expand their control over farming practices across the US if they were to choose to do so, or it could be used in litigation by activist organizations to force the federal government to exert that greatly expanded control.

Comments on the rule are due by July 21, 2014. The entire rule can be found at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-088-0001>.

Please contact us if you have questions.